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PROTECTING ARTISTIC PROPERTY WITH THE EQUITABLE SERVITUDE DOCTRINE*

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Law like nature abhors a vacuum. And if there be no law fostering and protecting the business interests of a growing segment of industry, the courts will readily adapt existing legal doctrines to meet the commercial needs of an industrial innovation. This principle of law has asserted itself repeatedly and the time may be ripe for it to assert itself again. The vacuum, so to speak, is the void in the law caused by the inadequate coverage of the Copyright Act; the filling force is the resurgence of the doctrine of equitable servitudes as applied to chattels.

Although the doctrine has existed for over a century, the employment of it to enforce restrictions placed upon personalty in the mercantile world has been judicially restrained. The infrequent use of the doctrine was caused by the courts' rejection of it as an enforceable equitable device and by their past refusal to give full recognition to it. Skepticism and disfavor which in the eyes of the courts surround such servitudes have consequently caused the doctrine to be dormant, if not forgotten. On one occasion it was discussed as being a basis for upholding a restriction placed upon a copyrighted article;[1] yet this attitude towards the doctrine was not uniformly shared by the courts or their respective judges. And even today, the judicial feeling toward the doctrine is mixed, both on the federal and state level.[2] Recently, however, the doctrine has been viewed in a new light which has caused some stir in legal writing although no noticeable change has yet taken place in the commercial world.[3] The new impetus given the doctrine together with the pattern of the latest decisions in this area point to the possibility of a new trend. A renaissance of the doctrine accompanied by a general acceptance of it might be the events which will form the desired legal protection against the piracy of intellectual and artistic works which find no protection under the Copyright Act.[4] The

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1 *In re* Waterman, Berlin & Snyder Co., 48 F.2d 704 (2d Cir. 1931).

2 Note the cases cited herein, federal and state, which illustrate the divergent views in regard to the recognition of the equitable servitude doctrine.

3 Nadell & Co. v. Grasso, 175 Adv. Cal. App. 449, 346 P.2d 505 (1959).

4 61 Stat. 652 (1947), Title 17, U.S.C. (1958).

purpose of this article is to explore the possibility of supplementing the Copyright Act with this equitable device.

DEFINING THE DOCTRINE

The recognition of the equitable servitude doctrine is dependent upon the circumstances surrounding the case considered in the light of public policy.[5] Consequently, it is difficult to arrive at an accurate definition of the doctrine. Despite this disadvantage in writing about the doctrine, a workable definition of it will prove to be helpful in the analysis of the doctrine and in the tracing of it through its historical development. For the purposes of this article, the doctrine of equitable servitudes is the basis for enforcing a servitude placed on chattels[6] in equity upon the legal principle that the restriction runs with the chattel for the benefit of the dominant tenement[7] at the expense of the servient tenement. The dominant tenement is that legally recognized property interest protected by a covenant against any invasion of the interest by the contracting party or by a subsequent assignee of the rights of the contract. Likewise, the servient tenement is that property interest which suffers the burden of carrying the restriction of servitude.

The dominant tenement can assume various forms, but in each case it must be a property interest which under the circumstances warrants protection. On the other hand, the servient tenement is always the particular chattel which carries the limitation. Even though the servient tenement remains the same, there are two types of servitudes that can be placed on it, affirmative and negative. As they suggest, the affirmative servitude requires acts to be performed whereas the negative servitude prohibits certain acts. Affirmative servitudes depend mainly on the circumstances in which they are used. Consequently, they are too numerous to classify. But negative servitudes have been sorted into the following usual types: price maintenance restrictions, territorial restrictions, resale restrictions, use restrictions and tying restrictions.[8]

Of particular interest is the determination of the dominant tenement. Justice Lillie points out that even the good will of a business is capable of being the dominant tenement since good will is legally recognized as a property interest.[9] Professor Chafee contends that the

[5] 18 B. U. L. REV. 441 (1938); 22 MINN. L. REV. 559 (1938) and Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels,* 69 HARV. L. REV. 1250 (1956); *cf.,* 22 COLUM. L. REV. 351 (1922) and 36 HARV. L. REV. 107 (1922). Compare, Giddings, *Land, Restrictions Upon the Use Of,* 5 HARV. L. REV. 274 (1891-2) with note, 17 HARV. L. REV. 415 (1904).

[6] It must be noted that the doctrine also applies to realty.

[7] For reasons against the dominant tenement theory, see Stone, *The Equitable Rights and Liabilities of Strangers to a Contract,* 18 COLUM. L. REV. 291, 309 (1918).

[8] Chafee, *Equitable Servitudes on Chattels,* 41 HARV. L. REV. 945, 948 (1928).

[9] Nadell & Co. v. Grasso, *supra* note 3, at 512.

dominant tenement in a copyrighted or patented article is the copyright or the patent interest itself.[10] His reasoning is cogent because a copyright is a property right.

> When the subject matter of a restriction is a patented article or copyrighted book, the case for enforcement against a subpurchaser is stronger than in the case of an ordinary chattel. First, the fact that the plaintiff already has a monopoly may render the courts less hostile to the restraint. Secondly, there is now no difficulty in finding a dominant tenement for the servitude, for this is supplied by the patent or copyright.[11]

Consequently, determining the dominant tenement in copyrighted articles presents little dfficulty. However, problems arise in defining a property interest which can be considered a dominant tenement when the artistic work does not fall within the coverage of the Act or common law copyright. In both situations, however, problems arise in determining the public policy upon which to sustain the application of the doctrine. Since the very basis for recognizing the doctrine is consideration of public policy, this factor plays no little role. The two opposing camps in considering public policy are the principle of the free alienation and use of personalty and the principle of protecting a certain property interest of the user of the servitudes.[12] An aid in overcoming public policy which is against the recognition of the doctrine is a showing that the dominant tenement is a property interest which should be afforded protection. An example of this procedure is to prove that the dominant tenement is a property interest defined and protected by the laws prohibiting "unfair competition."[13]

Besides considerations of public policy and the determination of the dominant and servient tenements notices must be given to subsequent assignees of the servitude on the chattel. Without notice of the restriction at the time of the assignment, the assignee cannot be held to comply with the limitation because failure to give notice will cause the servitude to stop "running" with the article.

Since the equitable servitude doctrine is the basis for granting an equitable remedy, the equitable principles of relief must be present, namely, the remedy at law must be inadequate[14] and the compliance with restrictions must not cause any unreasonable hardship to the defendant.

Historical Evolution of the Doctrine

An insight into the development of the equitable servitude doctrine will give an indication of the direction in which it will grow. The

[10] Chafee, *supra* note 8, at 998.
[11] *Ibid.*
[12] The conflict between the two theories is resolved by the balancing of the social and pecuniary interests of the party litigants.
[13] Restatement, Torts, §711-61 (1938).
[14] 1 Pomeroy, Equity Jurisprudence §217 at 367 (5th ed. 1941).

roots of the doctrine are imbedded in covenants concerning restrictions placed on the use of real property. In *Tulk v. Moxhay*,[15] a 19th century English decision, the court enunciated the principle that the vendor in the sale of land under certain circumstances could confine its use for certain purposes. The unique part of the principle was that it could be enforced against subsequent purchasers of the land who had knowledge of the use limitation at the time of their purchases. The reason for upholding this restriction was that price inequities would result if subsequent purchasers did not have to comply with use limitations. Thus, the seed had been sown, and it was soon cultivated by the courts until it had become an accepted part of real property law.

Ten years later the doctrine was applied to chattels. Lord Justice Knight Bruce in *De Mattos v. Gibson*[16] discussed this transition as follows:

> [W]here a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. *This rule, applicable alike in general as I conceive to movable and immovable property.* . . . [Emphasis supplied.][17]

Restrictions placed upon patented articles were likewise held to be valid. In one case, the plaintiff was a patentee and had granted the patent by contract which required the grantee and his assignee to pay a fixed percentage of the net profits to the plaintiff. The defendant, an assignee, failed to make payments and was held liable to account to the plaintiff for not complying with the original proviso.[18] Later, patented articles were considered a unique type of chattel and restrictions placed upon them were upheld without qualification.[19] Lord Hatherly expressed this attitude succinctly when he stated:

> The sale of a patented article carries with it the right to use it in any way that the purchaser choose to use it, unless he knows of restrictions. Of course, if he knows of restrictions and they are brought to his mind at the time of the sale, he is bound by them. He is bound by them on this principle: The patentee has sole right of using and selling the articles, and he may prevent anybody from using them or dealing in them at all,

[15] Tulk v. Moxhay, 41 Eng. Rep. 1143 (1848).
[16] De Mattos v. Gibson, 4 De G. & J. 276, 45 Eng. Rep. 108 (Ch. 1858).
[17] *Id.* at 110.
[18] Werderman v. Société générale d' Électricite, 19 Ch. D. 246 (1881).
[19] National Phonograph Co. v. Menck, [1911], A.C. 336, 350, where the court quotes from Incandescent Gas Light Co. v. Cantelo, [1895] 12 R. Pat. Cas. 262.

> he has the right to do the lesser thing, that is to say, to impose his own conditions. *It does not matter how unreasonable or how absurd the conditions are.* . . . [Emphasis supplied.][20]

Although the court did not speak of the equitable servitude doctrine as such, it must be noted that if the doctrine had been used, the result, the enforcement of a restriction upon chattels, would have been the same.

Unlike patented articles, restrictions placed upon copyrighted ones were not looked upon favorably by the English courts.[21] In one case, an author who had assigned the exclusive right to publish his book to a publishing company was unable to hold a subsequent assignee liable for royalty payments.[22]

Transplanting the equitable servitude doctrine from real property law to personal property law which had been successful earlier soon met with obstacles. And then it was all but struck from the list of enforceable equitable devices.

The classification of chattels into patented, copyrighted or common set the pattern for the development of the doctrine in England. Thus, the English courts scrutinized the particular kind of chattel involved before upholding or rejecting a servitude placed on it. This approach to the problem tends to cause confusion with respect to the application of the doctrine. Since it depends upon the chattel involved, the application of the doctrine is not only irregular, but it is difficult to determine to what extent the doctrine itself is the basis for upholding restrictions with respect to the preferred personalty. Although it can be said that the enforcement of a limitation makes the limitation a servitude running with the chattel, since the courts seldom speak in terms of the equitable servitude doctrine can it be said that the doctrine is the basis for upholding the limitation? This question, unfortunately, cannot be answered accurately, and to answer it in some instances would be pure conjecture.

This brief analysis of the problems accompanying the classification of chattels by the courts will have a profound effect upon the recognition of the equitable servitude doctrine with respect to copyrights. Until the courts further define the nature of the doctrine, it can only be said that the application of it to copyrights and ordinary chattels is dependent upon both the nature of the personalty and the circum-

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[20] *Ibid.*

[21] Note, 44 MARQ. L. REV. 237 (1960).

[22] Barker v. Stickney, [1919] 1 K.B. 121. However, in another case concerning copyrights, the court enjoined a publishing company from publishing a particular book when the author made a prior agreement which provided for another publisher to print it. The injunction was granted on the ground that the first publisher had an interest in the property of the copyright against third parties. Erskine Macdonald v. Eyles, [1921], 1 Ch. 631.

stances surrounding each situation with another contingent feature being the kind of restriction involved.

Putting the chattel into one of the three pigeonholes also took place in the United States, but fortunately, restrictions upon copyrighted articles met with more approval than they did in England. Consequently, the growth of the doctrine took different proportions. However, like the English courts, the American courts usually held limitations on chattels with some distain since restrictions would fetter the free use and flow of such good.[23]

This inflexible attitude towards restrictions on chattels not only permeated some courts, but it seeped into Congress as well. This feeling is reflected in the Sherman Act[24] which forbade price restrictions. The passage of the Sherman Act darkened the hopes for the usage of the doctrine for price maintenance. However, Congress corrected their mistakes by enacting the McGuire Act[25] which amended the Sherman Act and, thereafter, the future of the doctrine became brighter. Under the McGuire Act manufacturers and vendors were given the right to stipulate resale prices within reasonable limits. Violations of these price contracts were remedied by injunctive relief

With respect to ordinary chattels, the type of limitation is an important factor in accepting or rejecting restrictive convenants. Price maintenance restrictions now are not difficult to enforce since the passage of the McGuire amendment. A territorial restriction was upheld when the defendant attempted to sell an inferior quality of cigarettes in the United States contrary to the terms of a contract which had been made earlier by the plaintiff with another.[26] The judicial attitude towards use[27] and tying[28] restrictions was not favorable although in New York a use restriction was upheld when a purchaser of a machine did not comply with a limitation placed on it.[29] The greatest advancement the equitable servitude doctrine has had took place in

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[23] See *infra* notes 27 and 37 for cases.

[24] 26 Stat. 209 (1890), 15 U.S.C. §1 (1958).

[25] 66 Stat. 631 (1952), 15 U.S.C. §45(a)(3) (1958). The Sherman Act was changed by the Miller-Tyding Amendment, 50 Stat. 693 (1937), 15 U.S.C. §1, which validated resale price maintenance contracts in interstate commerce, thus placing them beyond the sanctions of the Sherman Anti-Trust Act. In 1952, the McGuire Act specifically exempted nonsigner provisions from the Sherman Act. The McGuire Act was held constitutional in Norman M. Morris Corp. v. Hess Bros., Inc., 243 F.2d 274 (3d Cir. 1956).

[26] P. Lorillard Co. v. Weingarden, 280 Fed. 238 (W.D.N.Y. 1922), *cf.*, Russell v.Tilgham, 275 Fed. 235 (E.D. Va. 1921).

[27] National Skee-Ball Co. v. Seyfried, 110 N.J. Eq. 18, 158 Atl. 736 (1932); *In re* Consolidated Factors Corp., 46 F.2d 561 (S.D.N.Y. 1931) (restrictive sale of stock); Garst v. Hall, 179 Mass. 588, 61 N.E. 219 (1901) and Coca Cola Co. v. Bennett, 238 Fed. 513 (8th Cir. 1916) (trade mark restriction).

[28] Motion Picture Co. v. Universal Film, 243 U.S. 502 (1917).

[29] New York Bank-Note Co. v. Hamilton Bank Note Engraving & Printing Co., 83 Hun. 593, 31 N.Y.S. 1060 (1895).

California with the *Nadell Case.* The decision reflects the realistic thinking that courts should apply when solving problems in commerce. Not only did the court uphold a negative and an affirmative servitude, it took cognizance of the doctrine and used it as the basis of the decision. Although the servitudes were placed on ordinary chattels, a study of the elements of the doctrine considered in this case will be significant when applied to copyrighted articles.

Plaintiff purchased from a railroad company a quantity of Kraft-brand fruit salad that had become frozen in transit. Plaintiff agreed he would not allow the goods to enter retail outlets under the Kraft label. Plaintiff then sold the merchandise to a wholesaler with the restriction that the goods were to be removed from the jars and the jars with caps and cases were to be returned to plaintiff. Subsequently, a wholesaler sold a portion of the goods to the defendant. Although defendant had knowledge of the restriction at the time of the sale, he refused to comply with it and sold some of the goods in the Kraft-jars to retailers. The trial court granted plaintiff injunctive relief against the defendant upon the basis of broad equitable principles. The California Supreme Court affirmed the decision of the trial court for plaintiff on the ground that the facts warranted an application of the equitable servitude doctrine to chattels.

The way for the acceptance of the doctrine by the California court had been previously prepared by earlier decisions which were analogous to the doctrine both as to realty and as to personalty. In 1919[31] and later in 1940,[32] the doctrine was applied to land transactions, but at the turn of the century it had already recognized price restrictive agreements on chattels.[33] The fair trade laws were held constitutional[34] without any difficulty since price maintenance agreements had been extended to third parties by an earlier court decision.[35] Consequently, the recognition and application of the doctrine had been supported both by precedent and by public policy. Due to the important role public policy plays in the recognition of the doctrine, and since the ground work had been previously laid, the *Nadell* decision fitted squarely into the pattern set by the earlier decisions.

Moving now into the area of patented articles, although the Patent Act[36] of the United States is similar in wording to the English one, the American courts took an entirely different view toward restrictions

[30] Nadell & Co. v. Grasso, *supra* note 3.
[31] Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919).
[32] Marra v. Aetna Construction Co., 15 Cal. 2d 375, 101 P. 2d 490 (1940).
[33] Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745 (1909).
[34] Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 117 (1936); Scovill Manufacturing Co. v. Skaggs Pay Less Drugs, 45 Cal. 2d 881, 291 P. 2d 936 (1955).
[35] D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912).
[36] 66 Stat. 792 (1952), Title 35 U.S.C. (1958).

placed upon patented works. The statutory monopoly granted by the patent gave the patentee only the right to prevent others from using, making or selling that which had been patented.[37] The patent did not give the right to make restrictive agreements, nor was this right given by judicial interpretation of the Patent Act such as it was given in England.[38]

The application of the equitable servitude doctrine to copyrighted articles turned out to be more complex than it was to either ordinary or patented chattels. Besides interpreting the Copyright Act, the court must take a look at the type of chattel copyrighted and the state's or court's attitude towards restrictions placed upon copyrighted goods. If the restriction placed upon the article clearly was part of the statutory monopoly granted by the Act, no problem arises because the restriction could be enforced under the statutory grant. The complexity of applying the equitable servitude doctrine is due to the intricacy of questions surrounding copyrights. The first questions to be answered are: Is the article copyrightable? Is it protected under the Copyright Act or the common law copyright? Is the restriction placed on the article one enforced by the Copyright Act or the common law copyright? The final question would be: If the article is copyrighted, but the restriction on it is not one recognized by the Copyright Act or by the common law copyright, can the restriction be enforced by the equitable servitude doctrine? The answer to this question will be considered in the following material.

In answering the last question posed, consideration of the following factors must be made: the public policy of the state or the attitude of the court towards restrictive agreements on chattels and, more paricularly, copyrighted articles; the type of restriction involved; the effect of the doctrine of publication; the business interest of the proprietor to be protected and the possible harm that would result in enforcing the restriction; and the disclosure of the dominant and servient tenement. The requirement of notice is a practical question and will not be dealt with extensively. To prove the inadequacy of the remedy at law is another factor, but in most cases it will not present an insurmountable obstacle. Thus, it too will not be considered in detail.

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[37] Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8 (1918) (price restriction); Straus v. Victor Talking Machine Co., 243 U.S. 490 (1917) (price restriction); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917) (tying restriction). Powell, *The Nature of a Patent Right,* 17 COLUM. L. REV. 663 (1937); Keasbey, *Restrictive Covenants as Applied to Territorial Rights in Patented Articles,* 10 HARV. L. REV. 1 (1896). One reason for upholding restrictions placed upon statutory monopolies is that the defendant will not be able to avail himself of the plaintiff's industry and gain a "free ride." Eager, *Unfair competition,* 46 HARV. L. REV. 1171, 1173 (1932); note 47 HARV. L. REV. 1419, 1424 (1934).

[38] Bauer v. O'Donnell, 229 U.S. 1 (1912).

The intricacy of applying the equitable servitude doctrine is due both to the difficulty in establishing the interrelated requirements which give rise to the doctrine and to the jurisdictional conflicts in determining the applicable law of the subject matter. It would be little consolation to the user of the doctrine to satisfy the requisites of the doctrine if the circumstances of the case were controlled by the law of another area. Therefore, the first consideration is to ascertain the law applicable to the subject matter. The first step in this direction then is to determine whether or not the article is copyrightable. Even if a copyright can be granted (or is granted), it must be ascertained if the protection sought is given by the Copyright Act. If the business interests of the copyright owner are not being shielded by the Act, the next step is to conclude whether or not the servitude placed on the copyrighted article is in contravention to the terms of the Act. If no conflict arises, then the copyright owner is free to establish the elements of the doctrine.

If in the first step mentioned above it is found that the article is not copyrightable under the Act, the applicability of the common law copyright must be ascertained. Likewise, it must be determined whether protection is given under the common law copyright and whether the servitude placed on the article conflicts with this area of the common law. If neither the Act nor the common law copyright apply, then other principles of the common law of the state will control the application of the doctrine.

To reiterate, after it is concluded that the doctrine of equitable servitude will apply, the elements of the doctrine can be established, viz., the public, the definition of the property interest sought to be protected (the dominant tenement), the notice of the restriction, and the inadequacy of relief at law. Illustrations of the foregoing steps concerning the application of the doctrine will be considered next.

Protection Afforded Under the Copyright Act

The power to enact laws by the United States Congress concerning copyrights is granted by the Constitution:

> The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[39]

Congress has exercised this power and has added amendments to the Copyright Act the most important amendment being passed in 1909.[40]

Under section 1(a)[41] the proprietor of a copyright has the exclusive right "To . . . copy, and vend the copyrighted work."[42]

[39] U.S. Const., Art. 1, Sec. 8, cl. 8.
[40] 35 Stat. 1075,88 (1909), Title 17 U.S.C. (1958).
[41] 61 Stat. 652 (1947), U.S.C. §1(a) (1958).
[42] *Ibid.*

With respect to copying the work of the proprietor of the copyright, the line of judicial decision concerning this right has encompassed an extremely broad area, and the use of the equitable servitude doctrine in this area will probably be superflous.

The owner of the copyright has the right to "vend" or transfer the copyrighted work. However, once the right is exercised and the goods are sold, the Act does not protect him in subsequent sales which are at a different price.[43] Therefore, price maintenance is not a right provided by the Act even though a copyright is granted on the article. Keeping in mind the previously mentioned form used in determining the applicability of the equitable servitude doctrine, the next step is to ascertain whether price maintenance contravenes any provision of the Act. Since the Act does not specifically prohibit or limit price restrictions, this question is resolved, and the doctrine can be employed to supplement the Act in this area. Establishing the requisites of the doctrine, of course, must be considered next. Although at one time it was considered a violation of the Sherman Act[44] to place a fixed price restriction on a copyrighted article, the passage of a later amendment to that Act and the passage of fair trade acts in the various states has removed this obstacle.[45] Thus there will be room for the doctrine to grow with respect to price maintenance. Public policy will support price maintenance since price cutting is a form of unfair competition. The dominant tenement would be the copyright and the servient tenement would be the article itself.[46] Notice can be given to subsequent purchasers by placing the price proviso on the outside of the container. Since non-compliance with the price restriction by subsequent purchasers would cause irreparable damage to the plaintiff, which damage would not be adequately compensated at law, equitable relief can be invoked.[47] Thus, the doctrine can apply under section 1(a); the doctrine is not only pertinent in its applicability, but it can also be established without difficulty.

Section 1(b), clause 5[48] provides, "To complete, execute, and finish it if it be a model or design for a work of art. . . ." The Judicial interpretation of this clause is that the author or designer does not have an exclusive right to manufacture the article described in the certificate of copyright registration. It was felt that to give such an

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[43] Bobbs-Merril v. Straus, 210 U.S. 339 (1908).
[44] Straus v. American Publisher's Ass'n. 231 U.S. 222 (1913); Dr. Miles Medical Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911); Annot., 7 A.L.R. 449 (1920); Annot., 19 A.L.R. 925 (1922); Annot., 32 A.L.R. 1087 (1924); Annot., 103 A.L.R. 1331 (1936); Annot., 125 A.L.R. 1335 (1940); Annot., 64 A.L.R. 2d 758 (1959).
[45] *Supra* note 25.
[46] *Supra* note 10.
[47] POMEROY, *supra* note 14.
[48] 61 Stat. 652 (1947), 17 U.S.C. §1(b) (1958).

exclusive right would "unjustly create a monopoly and moreover would usurp the functions of letters patent."[49] Consequently, a copyright can be granted only to complete the design on a garment, but it will be ineffective against pattern and design pirates after the garment is manufactured and distributed to the public for sale.

Reliance upon common law copyright for protection in this area would be of no avail since the manufacturing of the garment with the design desired to be guarded against piracy would be a publication of the very design itself. And the sale of the garment to the general public would cease any common law copyright in the design.[50]

Although it would seem that this form of piracy would fall under the purview of the law prohibiting unfair competition, protection afforded under this area of the law cannot ordinarily be successfully invoked.[51]

The unfortunate result of these decisions is that there is a piracy of styles and designs in many important industries, particularly in the ladies garment industry.[52]

Although the *Adelman*[53] decision stated that to grant a copyright on a design would usurp the patent field, a patent is not available to the designer because his design is not an "invention" and also it has only seasonal value in commerce.[54] Thus, the Patent Act will offer no protection to the designer.

Consequently, the existing law is void of protection. Since copyrights, (statutory or common law), patents and principles of unfair competition do not cover designs, reliance must be placed on another phase of the common law of the state. An examination of the equitable servitude doctrine shows that it has great possibilities to give the desired protection to the garment industry. Public policy, the most difficult factor to establish, would be based upon the protection of the property interest that the designer has in his design. This right should be protected ". . . even at the risk of 'restricting and hampering manufacture and trade' in such type of business."[55] Thus, the evils of design stealing should more than off-set the fettering of the designs by restrictive covenants. The dominant tenement would be that right of the designer in his design which would be guarded by a covenant prohibiting others from copying it. The servient tenement and notice

[49] Adelman v. Sonner, 21 U.S.P.Q. 218 (1934) and Kemp & Beatley v. Hirsch, 2 U.S.P.Q. 259 (1929) cited in HOWELL, THE COPYRIGHT LAW, 124 (1942). For a discussion of the difficulties in getting a patent on designs, see note 72 HARV. L. REV. 1520 (1959).

[50] Fashions Originators Guild of America, Inc v. Federal Trade Commission, 114 F.2d 80 (2d Cir., 1940), *aff'd*, 48 U.S.P.Q. 483 (1940).

[51] Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d Cir. 1929).

[52] Margolis v. National Bellas Hess Co., Inc., 249 N.Y.S. 175 (1941).

[53] *Supra* note 49.

[54] HOWELL, supra note 49 at 125.

[55] *Ibid.*

usually offer no problems since the servient tenement is that object which bears the servitude while the notice requirements can be satisfied by putting the terms of the servitude on a sticker on the outside of the garment and on the label in the inside of the garment. Money damages against a stealer of the design would not be adequate relief alone, but injunctive relief given in equity would be a better remedy to protect the designer from future piracy. In conclusion, the doctrine of equitable servitudes does seem to offer refuge to the clothing industry, particularly the pattern and design aspect of it.

Oftentimes the author will assign or license his work for dramatization purposes. Yet the author will desire to maintain some control over his work in order to prevent undesirable changes in plot or in characters. Or perhaps, he might wish to have the assignee or licensee make additions or deletions, which changes would contribute to a more artistic dramatization. The right which the author ultimately wishes to retain is the right to have changes made by the assignee or licensee only with his consent. These controls are usually incorporated in the contract and the courts look to the contract to determine the rights and obligations of both parties. If there be no contract between the author and the assignee or licensee which controls the right to elaborate on the literary work, the author is still not without some protection.[56]

> And now as to what is acquired when one procures the right to elaborate upon an original story. . . . I take it that, while scenery, action, and characters may be added to an original story, and even supplant subordinate portions thereof, there is an obligation upon the elaborator to retain and give appropriate expression to the theme, thought, and main action of that which was originally written. The unqualified grant of this right is, I should say, fraught with danger to a writer of standing, particularly when he inserts no provision for his approval of such elaboration as may be made. . . . Nevertheless, elaboration of a story means something other than that the same should be discarded, and its title and authorship applied to a wholly dissimilar tale.[57]

This secondary or incidental right of the Copyright Act is extremely broad when construed for the assignee or licensee. The author, however, might wish to stipulate precise changes or additions if the story is to be transformed into a play. The importance of this control over the work after it has left the author's hand is felt in the motion picture, radio and television industries.[58] Due to the recognition of controls over copyrighted works and their purposes of protecting the author from undesirable deviations, the doctrine of equitable servitudes, if used to place restrictions on the work, should be readily accepted

[56] Curwood v. Affiliated Distributors, Inc., 283 Fed. 219 (1922).
[57] *Ibid.*
[58] HOWELL, *supra* note 49 at 139.

by the courts. The doctrine has decided advantages over the contract device in maintaining control over the dramatization of the work by an assignee. One of the advantages is that the right which exists in equitable servitudes is a right *in rem* whereas in sub-contracts there exists only a right *in personam*.[59] Since the equitable servitude follows the literary work itself, there is no necessity to enter into sub-contracts with future assignees to maintain the rights granted under the first contract. The continuance of a restriction by means of sub-contracts become burdensome when third parties are reluctant to accept them or when they are hesitant to continue the restriction by means of further assignments. Thus when an author enters into a contract to have his work dramatized, the use of the equitable servitude doctrine will avoid the cumbersome practice of sub-contracts.[60]

One of the rights given by the Act is the exclusive right to publically perform the work for profit.[61] Whether it is recorded or live, the playing of the composition over the air has been held to constitute a public performance for profit which infringes the copyright if permission is not obtained from the proprietor. Hence, the composer has a remedy against one who would publically perform his musical work.

Another right given by the Act is the exclusive right to "copy" his own work.[62] Yet in *White-Smith Publishing Co. v. Apollo*,[63] the Supreme Court stated that a piano roll was not a copy of the work within the meaning of the Act and that therefore the proprietor of the copyright could not restrain the manufacturer from making and selling rolls which embodied the copyrighted material. Needless to say, this decision left the composer in an unfavorable position since he could neither prevent nor profit from the sale of recorded renditions of his copyrighted work.[64] Congress felt the inequities of this decision and amended the Act in 1909[65] to afford protection to the composer. The amendment provides for an exclusive right in the proprietor to mechanically reproduce his composition. But on the other hand, the amendment contains a "compulsory licensing provision" or "accessibility clause" which provides that if the proprietor licenses the recording rights to a manufacturer, any other manufacturer can then record the composition by paying a certain sum to the proprietor.[66] The sum: Two cents for each record manufactured. The result: Reputable manufacturers disregard this section and deal directly with

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[59] 2 POMEROY, EQUITY JURISPRUDENCE, §429 at 198 (5th ed. 1941).
[60] CHAFFEE, supra note 8.
[61] 61 Stat. 652 (1947), 17 U.S.C. §1(e) (1958).
[62] 61 Stat. 652 (1947), 17 U.S.C. §1(a) (1958).
[63] 209 U.S. 1 (1908).
[64] Todamerica Musica v. R.C.A., 171 F.2d 369 (2d Cir. 1948).
[65] 35 Stat. 1075 (1909), 17 U.S.C. §1(e) (1958).
[66] *Ibid.*

the publisher; Disreputable "disk-leggers" or pirates ignore it because of the inadequate damages provided by the Act.[67]

Despite the inadequacy of relief afforded by the Act, it is doubtful if the equitable servitude doctrine can be applied to remedy the situation. A restriction placed on each record which forbids anyone to copy it without the proprietor's consent would be in direct contravention to the Act. Or, a restriction which would make the "royalties" greater (even to a reasonable amount) would seemingly run afoul of the Act and therefore would not be enforced by the courts.

It must be noted, however, that the right to copy records on the condition that the copier pays the two cents does not include the right to play those records in public for profit.[68] The playing of records in public against the stipulation on the label that the records are for private use only will be considered in the following material.

The Doctrine and Common Law Copyright

The application of the equitable servitude doctrine to articles copyrightable under the Act had been considered. The use of the doctrine in the area of common law copyright presents different problems. The greatest obstacle to overcome other than public policy is the doctrine of publication. Under this doctrine the owner of a common law copyright loses his interest in the copyright when the work is published for public use.[69] Since the equitable servitude doctrine is contingent upon the existence of the copyright, be it under the Act or by a common law right, the loss of the copyright would involve the virtual loss of the dominant tenement.

The protection afforded by the common law copyright to the artist which prohibited any unauthorized copying or using of his work was considered perpetual and was first recognized in an 18th century English decision.[70] Shortly after this decision, it was held that a statute abrogated this perpetual attribute and unless the property interest was covered by the statute,[71] publication of the work by the artist terminated the copyright.[72] Common law copyright was recognized in the United States[73] and the doctrine that publication by the artist resulted

[67] Note, 5 Stan. L. Rev. 433, 441 (1953); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260 (2d Cir. 1957) held that the damage provisions of §101(b) are not applicable to the infringement of a musical copyright by mechanical reproduction. Such infringements were held to be governed exclusively by §101(e) which sets damages at two cents per record plus a discretionary allowance not to exceed three times that amount. However, court costs and attorney fees are recoverable. The home dubber who records music with his own tape recorder need only pay 8 cents: royalty, 2 cents; treble damages, 6 cents. Note, 5 U.C.L.A. L. Rev. 663 (1958).

[68] Berlin v. Daigle & Russo, 31 F.2d 832 (5th Cir. 1929).

[69] Nimmer, *Copyright Publication*, 56 Colum. L. Rev. 185 (1956).

[70] Miller v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769).

[71] 8 Anne, c. 19 (1709).

[72] Donaldson v. Beckett, 4 Burr. 2408, 98 Eng. Rep. 257 (K.B. 1774).

[73] Press Publishing Co. v. Monroe, 73 Fed. 196 (2d Cir. 1896); Baker v. Libbie,

in the loss of his copyright interest was also recognized.[74] However, tracing the history of the doctrine of publication in the United States reveals that it might give way to a more realistic approach. Consequently, the application of this doctrine which results in the loss of the common law copyright might not prove to be an obstacle in the path of the equitable servitude doctrine. A review of use restrictions placed upon records by a performer illustrates this point.

Since the Act only protects the rights of the composer and publisher,[75] the performer is without statutory shelter. Although the performer can copyright a musical arrangement as a "new work"[76] after he has permission of the composer, the arrangement, to be copyrightable, must be so distinct from the original composition "that any person hearing it played would become aware of the distinctiveness of the arrangement."[77] These judicial restraints have hampered the effectiveness of the provision. If the records themselves could be copyrighted the problem would be solved, but this right has not been given.[78] Even if records could be copyrighted, it is contended that the disadvantages attached to the procedure of copyrighting would outweigh the advantages gained by the performer.[79]

In order to meet this problem, Fred Waring formed the National Association of Performing Artists.[80] After Waring's orchestra had made records, he had inscribed on the legend, "Not licensed for radio broadcast."[81] Despite this inscription, a radio station purchased records and used them for broadcast purposes. To compel the station to stop playing his records over the air, Waring sued for injunction. Presented with this issue, the court pointed out that a rendition was "not the subject of protection under existing copyright laws."[82] However, the court felt that Waring had a common law right in his orchestra's rendition. Justice Stern writing for the majority met the question of the doctrine of publication by quoting from an earlier decision which stated that the restriction placed on the record limited the publication

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210 Mass. 599, 97 N.E. 109 (1912); The New Jersey Staten Dental Society v. The Dentacura Co., 57 N.J.Eq. 593, 41 Atl. 672 (1898).

[74] See cases cited in *supra* note 73.

[75] Note, 5 U.C.L.A. L. Rev. 663, 666.

[76] 35 Stat. 1077 (1909), 17 U.S.C. §7 (1958).

[77] Supreme Records v. Decca Records, 90 F. Supp. 904, 908 (S.D. Cal. 1950).

[78] Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469 (1955); Boss, *Interpretive Rights of Performing Artists*, 42 DICK. L. REV. 57 (1938).

[79] Countryman, *The Organized Musicians:* II, 16 U. CHI. L. REV. 239, 259 (1949); Chafee, *Reflections on the Law of Copyright:* II, 45 COLUM. L. REV. 719, 735 (1945).

[80] Warner, Radio and Television Rights 952-53 (1953).

[81] Waring v. WDAS, 327 Pa. 433, 194 Atl. 631 (1937). See also, notes, 22 MINN. L. REV. 559 (1938); 18 B.U. L. REV. 441 (1938) and 42 Dick. L. Rev. 88 (1938) for a discussion of the case.

[82] *Id.* at 633.

and the common law right was not lost.[83] Thus, it follows from this decision at least that the doctrine of publication is contingent upon whether there is a restriction placed on the article rather than whether the publication destroys the restriction. Therefore, it is doubtful if he had found the application of the doctrine of publication he would still have struck down the use restriction:

> Where public policy or some other determinative consideration is not involved, why should the law adopt an immutable principle that no restrictions, reservations, or limitations can ever be allowed to accompany the sale of an article of personal property. . . .[84]

Although Justice Stern did not speak in terms of the dominant tenement, he did define two property interests upon which the tenement could have attached. The Justice not only found a common law property right in the rendition but he found that the principles of "unfair competition" defined another property right—"the commercial value of the orchestra's performance."[85] Thus, there would not have been any difficulty in determining the dominant tenement.

The recognition of the equitable servitude doctrine in this area by the *Waring* decision, however, was soon disregarded by Judge Hand when he was confronted with a similar situation.[86] Speaking for the court, Learned Hand stated:

> We think that the "common-law" in these performances ended with the sale of the records and that the restriction did not save it; and that if it did, the records themselves could not be clogged with a servitude.[87]

The *Whiteman Case* has not withstood the test of time and the necessity of practicality. The result of Judge Hand's reasoning was to allow record piracy to remain unhindered. Fifteen years after the *Whiteman* decision the Second Circuit reversed its ground and allowed a manufacturer to restrain another manufacturer from marketing records which embodied a performing right which belonged to the first manufacturer.[88] The new policy towards restrictions placed on records was explained by District Judge Dimock as follows:

> We believe that the inescapable result . . . is that where the originator, or the assignee of the originator, of records of performances by musical artists puts those records on public sale,

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[83] American Tobacco Co. v. Werkmeister, 207 U.S. 284 (1907).
[84] Waring v. WDAS, *supra* note 81, at 637.
[85] *Id.* at 641.
[86] R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied,* 311 U.S. 712 (1940).
[87] *Id.* at 88.
[88] Capitol Records v. Mercury Records, 221 F.2d 657 (2d Cir. 1955); note, 31 N.Y.U. L. Rev. 415 (1956).

his act does not constitute a dedication of the right to copy and sell the records.[89]

Thus, the application of the doctrine of publication formerly resulted in the loss of the common law property right, and servitudes on the chattel did not prevent the doctrine from operating. However, the publication doctrine has been judicially whittled away to the extent that it now will probably not hinder the application of the equitable servitude doctrine.

Such artistic productions as news[90] or cartoons[91] although embodying intellectual qualities still do not come under the purview of the Act. With respect to a news-story, the principles which prohibit unfair competition have defined a "quasi" property interest in them.[92] Therefore, the user of the equitable servitude would find no difficulty in supporting restrictions placed on a news-story or cartoon since there exists an interest to which the dominant tenement would attach. Restrictions placed on such a work would not be against public policy because to copy a news-story or to broadcast it over the air without the owner or association's consent would be a form of unfair competition. Justice Pitney made this point clear:

> Although the literary quality of reporting news is copyrightable, the "news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*. . . . It is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it."
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> The right that the association [International News Service] has is a quasi-property right which warrants protection in the assembled news itself.[93]

In *Associated Press v. KVOS*,[94] a similar problem arose. The defendant radio station was enjoined from broadcasting news taken from newspapers which were recipients of plaintiff's service. Since they were competing against each other in the collection and communication of news, such a taking by the radio station was considered unfair competition.

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[89] *Id.* at 663.
[90] International News Service v. Associated Press, 248 U.S. 215 (1918); Nimmer, *supra* note 74 at 193.
[91] Fisher v. Star, 231 N.Y. 414, 132 N.E. 133 (1921).
[92] International News Service v. Associated Press, *supra* note 95, at 237 and Associated Press v. KVOS, 80 F.2d 575, 579 (9th Cir. 1935).
[93] International News Service v. Associated Press, *Supra* note 90, at 234.
[94] Associated Press v. KVOS, *supra* note 92.

Therefore, if the news service has the right to absolutely enjoin others from pirating his service, it would seem that he has the right to place certain conditions on the use of his service. Such a use restriction could be easily enforced through the employment of the equitable servitude doctrine. The requisites of the doctrine can be established by showing that non-compliance with the restriction is piracy and that the dominant tenement is that "quasi" property right defined in the laws prohibiting unfair competition.

THE USE OF THE DOCTRINE BY THIRD PARTIES

The growth of the doctrine will not only affect the substantive rights of an owner of a copyright under the Act or at common law, but third parties who deal in copyrighted articles can conceivably share in the benefits afforded by the doctrine. As the facts of the *Nadell Case*[95] bring out, the servitude which was placed upon the Kraft-brand fruit salad was not put there by the Kraft Company. Instead, a railroad company which sought to protect the good will of the Kraft Company formulated the negative and affirmative servitudes. Although it cannot be said that the railroad company did not benefit from the servitudes, the Kraft Company received the direct benefits as if it were a third party beneficiary. Thus, in order to enter into a restrictive agreement and apply the equitable servitude doctrine, the initiating party does not have to be protecting a property interest of his own, but he can protect a property interest of another.

Unlike the proprietor or the performer, the manufacturer of copyrighted articles is not protected by the Copyright Act.[96] The rights that he has with respect to copyrighted articles are those generally derived by the succession of rights from the artist through contract.[97] Due to the adaptibility of the equitable servitude device, the manufacturers could employ it to place restriction upon the copyrighted goods that he manufactures. Since the servitude runs with the chattel it will be enforced against third persons who have notice.[98]

Distributors or carriers (as in the *Nadell Case*) could also participate in the use of the doctrine to protect artistic works. For example, if a quantity of records had become slightly defective through storage or shipment, the distributor or the carrier would not want to have the records sold to the public under a representation that the records were in perfect condition. To do so would destroy the good will of the record manufacturer and the reputation of the recording artist. Thus, the distributor or carrier would desire to have the records sold

[95] Madell & Co. v. Grasso, *supra* note 3.
[96] Capitol Records v. Mercury Records, *supra* note 88.
[97] The Manufacturer, however, might contribute some technical quality to the copyright articles and would then, of course, be protected by the Act. *Contra*, R.C.A. v. Whiteman, *supra* note 86.
[98] Note 5 U.C.L.A. L. REV. 663, 670 (1958).

only if the public was informed of their defective condition. To give notice to the public that the records were defective would be a servitude with which the retailer must comply. This servitude could be enforced by means of the equitable servitude doctrine. Undoubtedly, the distributor or the carrier sold the records at a price which was lower than the price the records were originally worth. If the retailer were to sell them at the original price, inequities would result thereby. These price inequities would be another factor in the recognition of the equitable servitude doctrine.

Recognition of the Doctrine by the State Courts

Cases concerning artistic property and the doctrine of equitable servitudes will be decided upon state law under the theory of *Erie Railroad Co. v. Tompkins.*[99]

> Since the Copyright Act does not deal with the protection of phonograph records of the performances of public-domain compositions by virtuosos, [and since] we have no basis for applying federal law [state law will have to apply].[100]

Since the growth of the doctrine is dependent upon the attitude of each state towards restrictions placed upon chattels, a review of the decisions of a state will be necessary in order to determine whether the doctrine will be recognized by the particular state. However, not every state has had the opportunity to express its public policy concerning servitudes on chattels, nor has each state been presented the opportunity to make a decision with respect to the equitable servitude doctrine. Yet, price restrictions placed upon chattels under the fair trade laws of a state are considered a servitude. Although not all states have adopted fair trade laws,[101] among those states that have them there exists a difference of opinion as to the constitutionality of price restrictions against third parties or commonly called nonsignors.[102] A factor in predicting whether a court will recognize the application of the equitable servitude doctrine to chattels and then to copyrighted articles is whether the court has previously upheld the constitutionality of price fixing agreements against nonsignors. For

[99] Erie Railroad v. Tompkins, 304 U.S. 64 (1937).

[100] Capitol Records v. Mercury Records, *supra* note 88, at 662.

[101] The states that do not have fair trade laws: Alaska, Missouri, Nebraska, Texas and Vermont. The states that have passed fair trade laws, but do not have rulings concerning their constitutionality as to nonsigners: Alabama, Idaho, Maine, Montana, Nevada, North Dakota, Tennessee, Virginia and Wyoming. CCH Trade Reg. Rep. ¶¶3003 and 10,000.

[102] The states that have upheld the constitutionality of the fair trade laws as to nonsigners: Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Dakota and Wisconsin. The states that have rejected the nonsigner clause as being unconstitutional: Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, South Carolina, Utah, Washington, West Virginia and Wisconsin. Louisiana has held the fair trade laws unconstitutional in part. *Ibid.*

example, the Louisiana Supreme Court in *Dr. G. H. Tichenor Antiseptic v. Schwegmann Brothers Giant Super Markets*[103] declared that the extension of the fair trade laws to include nonsignors was unconstitutional because it was against the public policy of the state:

> Equitable Servitudes running with a movable and restraints on the alienation of movable property are disfavored under the public policy of this State. Once a movable is sold, the seller relinquishes all interest therein and conditional sales whereby the vendor retains title to the property, are not recognized in Louisiana.[104]

To contrast the Louisiana position California, which was the first state to adopt the fair trade laws and further upheld their constitutionality against nonsignors, recognized without difficulty the docrtine of equitable servitudes applied to chattels.[105]

Since the recognition of the doctrine would vary from state to state, the use of it to supplement the Copyright Act would not be nationally uniform. One of the purposes of the Act was for uniformity of protection to the copyright proprietor. Consequently, there will be a conflict between the federal and state jurisdictions. Yet, this dicotomy of protection, no matter how unfortunate it seems to be, is due to the relationship of federal and state law itself. The passage of the Copyright Act did not exclude the states from rendering protection to artistic productions:

> . . . to construe a constitutional grant of power to Congress as excluding the exercise of state power in the area of the grant is contrary to the traditional canons of constitutional construction. Further, the broad purpose of the clause, to encourage progress in science and the arts, seems to require allowance of state participation in the protection of writings. . . . The progress envisioned by the copyright clause would hardly be promoted if new kinds of literary and artistic property could not be protected by state law, at least until Congress dealt with the new problems of protection.[106]

Although it must be contended that it would be more desirable to have uniformity in regard to the protection given the product of the artist, such uniformity is not always the predominate issue.[107]

CONCLUSION

It must be noted that there are many variables which will affect the growth of the doctrine in the area of copyrighted articles. The

[103] 231 La. 51, 90 So. 2d 343 (1956).
[104] *Id.* at 350.
[105] Nadell & Co. v. Grasso, *supra* note 3.
[106] Kalodner & Vance, *The Relationship Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1082 (1959).
[107] *Id.* at 1085. See also note 26 Ia. L. Rev. 384 (1941); "[P]rotection, if it is to come at all without legislation, must come from the common law." *Id.* at 388.

most influential variable would be a change in the Copyright Act itself which would give greater protection to the copyright owner. Such an amendment would be more reliable in guarding the copyright proprietor's rights than would the doctrine. Consequently, the equitable device to enforce restrictions on chattels would then be employed only to a limited extent.

The vacuum created by the inadequate protection afforded under the present Copyright Act, however, has caused a search for legal methods to fill the gap. The doctrine, although only recognized sporadically, is the most flexible device available. The remedies granted under the doctrine alone place it in a most enviable position among other legal methods. Because it is part of the equity jurisdiction of the court, both injunctions and specific performance can be granted to give relief.

Further clarification of the doctrine by judicial application will make it a more effective and a more reliable source of protection to the creator, manufacturer, distributor and carrier of artistic property. Should the present proclivity towards the recognition of the doctrine continue, there is a possibility that it will take its place as an integral part of personal property law. Should this evolution of the doctrine come about, artistic innovators need not fear that their contributions to the world will be pirated due to the inadequate protection of the present Copyright Act.